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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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MARC OLIN LEVY,

Plaintiff,

v.

FIRST GROUP/GREYHOUND,

Defendant.

Case No. 17-cv-00412-KAW

**ORDER DISMISSING CASE WITH
PREJUDICE; DECLARING PLAINTIFF
A VEXATIOUS LITIGANT**

Re: Dkt. No. 9

I. INTRODUCTION

On January 26, 2017, Plaintiff filed the instant suit against Defendant First Group/Greyhound, alleging breach of contract and negligence. (Compl., Docket No. 1.) Plaintiff also filed an application to proceed in forma pauperis, which the Court granted on February 8, 2017. (Dkt. Nos. 2, 8.) On March 2, 2017, the Court dismissed Plaintiff's complaint with leave to amend, finding that Plaintiff had not alleged adequate facts to support his claims. (Ord. at 3-4, Dkt. No. 9.) In that order, the Court also required Plaintiff to show cause why he should not be declared a vexatious litigant and have a pre-filing order entered against him, based on the 21 lawsuits he had filed in this district, "nearly all of which were dismissed at an early stage for having no merit." (*Id.* at 6.) The Court gave Plaintiff thirty days to file an amended complaint that corrected the deficiencies identified in the order, and to respond to the order to show cause. (*Id.* at 7.) As of the date of this order Plaintiff has not filed an amended complaint or responded to the order to show cause.

II. DISCUSSION

A. Dismissal Without Prejudice

Federal Rule of Civil Procedure 41(b) permits the involuntary dismissal of an action or

1 claim for a plaintiff's failure to prosecute. *See Link v. Wabash R. Co.*, 370 U.S. 626, 630-31
2 (1962) ("authority of a court to dismiss sua sponte for lack of prosecution has generally been
3 considered an 'inherent power'"). Unless otherwise stated, a dismissal under Rule 41(b) "operates
4 as an adjudication on the merits." Fed. R. Civ. P. 41(b).

5 In the instant case, Plaintiff was ordered to submit an amended complaint within 30 days
6 of the March 2, 2017 order, or April 3, 2017.¹ The Court warned that "[f]ailure to file a first
7 amended complaint within 30 days of this order may result in dismissal of this action for failure to
8 prosecute." Plaintiff did not file an amended complaint. Because Plaintiff has failed to comply
9 with the Court's order, the Court DISMISSES Plaintiff's case with prejudice, for failure to
10 prosecute.²

11 **B. Vexatious Litigant**

12 When a litigant has filed numerous harassing or frivolous lawsuits, the Court has the
13 power to declare him a vexatious litigant and enter an order requiring that any future complaints
14 be subject to an initial review before they are filed. District courts have the power to enter pre-
15 trial filing orders against a vexatious litigant under the All Writs Act. 28 U.S.C. § 1651(a);
16 *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir 2007). The Ninth Circuit has
17 cautioned that "such pre-filing orders are an extreme remedy that should rarely be used" because
18 of the danger of "tread[ing] on a litigant's due process right of access to the courts." *Molski*, 500
19 F.3d at 1057. Nevertheless, such pre-filing orders may be appropriate because "[f]lagrant abuse
20 of the judicial process . . . enables one person to preempt the use of judicial time that properly
21 could be used to consider the meritorious claims of other litigants." *De Long v. Hennessey*, 912
22 F.2d 1144, 1148 (9th Cir. 1990).

23
24 ¹ Thirty days after March 2, 2017 is April 1, 2017, a Saturday. April 3, 2017 is the first following
business day.

25 ² Plaintiff consented to having a magistrate judge conduct further proceedings in this case.
26 (Docket No. 3.) The Court does not require the consent of Defendant because Defendant has not
been served and therefore is not a party within the meaning of 28 U.S.C. § 636(c). *See Ornelas v.*
27 *De Frantz*, No. 00-1067, 2000 WL 973684, at *2 n.2 (N.D. Cal. June 29, 2000) (citing *Neals v.*
28 *Norwood*, 59 F.3d 530, 532 (5th Cir. 1994) (magistrate judge has jurisdiction to dismiss prisoner's
civil rights action without consent of defendants because defendants had not been served yet and
therefore were not parties)).

1 The Ninth Circuit lists the following requirements for entering pre-filing orders against
2 vexatious litigants. First, the Court must give the litigant notice and an opportunity to be heard
3 before the order is entered. Second, the Court must compile an adequate record for review,
4 including a list of all filings leading to the conclusion that the individual is a vexatious litigant.
5 Third, the Court must make a substantive finding that the litigant's filings are frivolous or
6 harassing. Finally, the pre-filing order cannot be overly broad, but must be "narrowly tailored to
7 closely fit the specific vice encountered." *De Long*, 912 F.2d at 1147-48.

8 **i. Notice and Opportunity to be Heard**

9 The first factor requires that the litigant be given an opportunity to oppose the order
10 before it is entered. *De Long*, 912 F.2d at 1147. "Courts in this circuit have held that a motion to
11 declare a litigant vexatious does not require oral argument." *Gavin v. City & Cty. of SF*, Case
12 No. 15-cv-5202-EMC, 2016 WL 126937, at *2 (N.D. Cal. Jan. 12, 2016); *see also Reddy v.*
13 *MedQuist, Inc.*, No. 12-cv-1324-PSG, 2012 WL 6020010, at *3 (N.D. Cal. Dec. 3, 2012) ("The
14 requirement that the plaintiff receive an opportunity to be heard does not require an oral hearing;
15 the opportunity to brief the issue fully satisfies due process requirements") (internal quotation
16 omitted).

17 The Court finds that the first *De Long* factor is satisfied because the Court issued an order
18 to show cause, and Plaintiff had the opportunity to file a written opposition. (Ord. at 5-7.)
19 Courts in this district have found the first *De Long* factor to be satisfied under similar
20 circumstances. *See Gavin*, 2016 WL 126937, at *2 (finding that the first *De Long* factor was met
21 because the district court issued an order to show cause and gave the plaintiff an opportunity to
22 file a written opposition, even though no opposition was filed).

23 **ii. Adequate Record for Review**

24 The second factor is procedural, requiring only that the court compile a list of actions and
25 filings by the litigant. *See De Long*, 912 F.2d at 1147 ("An adequate record for review should
26 include a listing of all the cases and motions that led the district court to conclude that a
27 vexatious litigant order was needed"). This factor is met here as the Court has listed each of the
28 21 actions filed by Plaintiff in this district. (*See Attachment A.*) This list was also provided to

1 Plaintiff as an attachment to its order to show cause. (See Order, Attachment A.)

2 **iii. Frivolous or Harassing Filings**

3 The third factor requires that the district court consider "both the number and content of
4 the filings as indicia" of the frivolousness of the litigant's claims. *De Long*, 912 F.2d at 1148.
5 "An injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must
6 not only be numerous, but also be patently without merit." *Molski*, 500 F.3d at 1059. In
7 applying this factor, the Ninth Circuit has found the *Safir* factors listed by the Second Circuit to
8 be useful. *Id.* at 1058 (citing *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986)). These
9 factors include:

- 10 (1) the litigant's history of litigation and in particular whether it
11 entailed vexatious, harassing or duplicative lawsuits; (2) the
12 litigant's motive in pursuing the litigation, e.g., does the litigant have
13 an objective good faith expectation of prevailing?; (3) whether the
14 litigant is represented by counsel; (4) whether the litigant has caused
15 needless expense to other parties or has posed an unnecessary
16 burden on the courts and their personnel; and (5) whether other
17 sanctions would be adequate to protect the courts and other parties.

18 *Safir*, 792 F.2d at 24.

19 With respect to the first *Safir* factor, as discussed in its order to show cause, Plaintiff has
20 filed 21 lawsuits in this district since 2010. Many of these cases were filed on the same day,
21 with Plaintiff filing four lawsuits on November 10, 2010, six lawsuits on March 14, 2012, and
22 three lawsuits on January 26, 2017, including the instant suit. Nearly all of these lawsuits were
23 dismissed at an early stage for having no merit. (*E.g.*, *Levy v. Cumulus Media, Inc.*, Case No.
24 11-cv-6616-WHA, Dkt. No. 7 (dismissing case for failure to state a claim where Plaintiff sought
25 \$100 million in damages for an allegedly anti-Semitic slur that was personally offensive to him
26 when a radio announcer referred to Tim Tebow as "T-Brew"); *Levy v. NewsCorp*, Case No. 12-
27 cv-1293-EDL, Dkt. No. 7 (dismissing case for failure to state a claim where Plaintiff sought \$5
28 trillion for the defendant's alleged failure to report on stories that Plaintiff submitted); *Levy v. Comerica Bank*, Case No. 12-cv-1296-MEJ, Dkt. No. 6 (dismissing claim for failure to state a
claim where Plaintiff sought \$61 trillion because the defendant allegedly "steered" Plaintiff into a
\$30 to \$35 thousand business loan instead of the \$50,000 loan he requested); *Levy v. Primerica*

1 *Inc.*, Case No. 16-cv-1254-HRL, Dkt. No. 14 (granting motion to dismiss for failure to state a
2 claim where Plaintiff sought \$2 billion for being disqualified as a job applicant due to his
3 criminal record, and noting that this was the third employment lawsuit filed by Plaintiff in two
4 years). Several of these suits have been duplicative; for example, Plaintiff brought suits against
5 AT&T in 2011 and 2017, both alleging that AT&T had refused to publish his advertisement for a
6 Civil Rights law firm in its December 2011-2012 San Francisco Bay Area Yellow Pages.³ (See
7 *Levy v. AT&T*, Case No. 11-6615-DMR; *Levy v. AT&T*, Case No. 17-cv-411-MEJ.) Moreover,
8 in Plaintiff's 2017 suit against AT&T, the presiding judge has also issued an order to show cause
9 why Plaintiff should not be declared a vexatious litigant, to which Plaintiff likewise failed to
10 respond. (See *Levy v. AT&T*, Case No. 17-cv-411-MEJ, Dkt. No. 10.) In short, Plaintiff's
11 lawsuits have been "patently without merit." *Molski*, 500 F.3d at 1059.

12 The second *Safir* factor also weighs in favor of a pre-filing order, as there is no evidence
13 of an objective good faith expectation of prevailing. In fact, in many of Plaintiff's cases --
14 including the instant case -- the district court dismissed Plaintiff's complaint without prejudice
15 but allowed Plaintiff to file an amended complaint, which Plaintiff failed to do. (E.g., *Levy v.*
16 *N.Y. Life Ins. Co.*, Case No. 11-cv-6617-JCS (closing case where no amended complaint was
17 filed); *Levy v. NewsCorp*, Case No. 12-cv-1293-EDL (same); *Levy v. United States of America*,
18 Case No. 12-cv-1294-EDL, Dkt. No. 8 (same).) This repeated failure to prosecute further
19 demonstrates that Plaintiff had no good faith expectation of prevailing. The amounts claimed in
20 many of these suits have also been significantly disproportionate to the damages claimed. For
21 example, in the instant case, Plaintiff sought \$10 billion based on being "stranded" in St. Louis
22 and Grand Junction for a total of seven days. (Compl. at 6-7; see also *Levy v. Vista Holdings*,

23
24 ³ Notably, in several of these cases which were dismissed for failure to state a claim, Plaintiff
25 asserted that he was a lawyer, although he is not listed on the California State Bar website as being
26 licensed to practice law. (See *Levy v. AT&T Corp.*, Case No. 11-cv-6615-DMR, Dkt. No. 1
27 (stating that he is a "Federal Civil Rights Lawyer" but admitting that he is "not an attorney"); *Levy v. United States of America*, Case No. 12-cv-1294-EDL, Dkt. No. 1 (stating that he is a "pro se
28 lawyer"); *Levy v. United States of America*, Case No. 12-cv-1297-DMR, Dkt. No. 1 (same); *Levy v. AT&T Corp.*, Case No. 17-cv-411-MEJ, Dkt. No. 1 (stating that he is a "lawyer for the People"
but admitting that he is not an attorney).) Plaintiff's attempts to practice law without a license
further highlight the frivolous nature of his multiple filings.

1 Case No. 17-cv-409-JSC, Dkt. No. 9 at 2 (concluding to a legal certainty that Plaintiff's
2 complaint could not meet the \$75,000 amount in controversy based on an \$800 loan, even
3 though Plaintiff sought \$10 million in his complaint.) There can be no good faith expectation
4 for the amounts sought, even if Plaintiff was to prevail on the merits.

5 As to the fourth *Safir* factor, the Court finds that Plaintiff's numerous lawsuits have
6 imposed substantial costs upon the Court in terms of time and resources. Plaintiff's lawsuits
7 have been reviewed by twelve different judges in this district, and all of his cases have resulted
8 in dismissal. Plaintiff's suits have also imposed burdens on defendants who have been served,
9 requiring motions on the merits that Plaintiff often failed to timely oppose, if at all. (*E.g., Levy v.*
10 *State Farm Mutual Auto Ins. Co.*, Case No. 14-cv-4073-EJD, Dkt. No. 27 (granting motion for
11 judgment on the pleadings, which Plaintiff did not oppose); *Levy v. Northwestern Mutual Life*
12 *Ins. Co.*, Case No. 14-cv-4116-EJD, Dkt. No. 14 (granting motion to dismiss with prejudice,
13 which Plaintiff did not timely oppose); *Levy v. Mass. Mutual Life Ins. Co.*, Case No. 15-cv-6136-
14 EDL, Dkt. No. 15 (granting motion to dismiss with prejudice, which Plaintiff did not timely
15 oppose).⁴)

16 Finally, the fifth *Safir* factor weighs in favor of a pre-filing order. Dismissal of Plaintiff's
17 numerous cases has not deterred Plaintiff from continuing to file cases that lack merit. Further,
18 Plaintiff has now begun to bring cases based on the same events, suggesting that Plaintiff will
19 continue to litigate -- and re-litigate -- cases absent a pre-filing order. *See Martin*, 2015 WL
20 9489898, at *6 ("Martin's litigation history demonstrates that she has been unresponsive to the
21 courts' repeated, clear indications that her complaints are without merit").

22 Accordingly, the Court concludes that Plaintiff has filed numerous frivolous cases in this
23 district.
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25 _____
26 ⁴ Each of these cases involved Plaintiff's assertion that the defendants had discriminated against
27 him when they did not hire him. (*Levy v. State Farm Mutual Auto Ins. Co.*, Case No. 14-cv-4073-
28 EJD (seeking \$250 million based on the defendant not hiring Plaintiff because of Plaintiff's
criminal record); *Levy v. Northwestern Mutual Life Ins. Co.*, Case No. 14-cv-4116-EJD (seeking
\$200 million based on the defendant not hiring Plaintiff because of his lack of a bachelor's
degree); *Levy v. Mass. Mutual Life Ins. Co.*, Case No. 15-cv-6136-EDL (seeking \$2 billion based
on the defendant not hiring Plaintiff because of Plaintiff's debt).)

1 **iv. Narrowly Tailored**

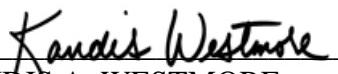
2 The final *De Long* factor requires that the pre-filing order be narrowly tailored to the
3 vexatious litigant's wrongful behavior. In the instant case, Plaintiff has filed numerous cases on
4 a multitude of claims, all of which have been dismissed. In light of this litigation history, the
5 Court finds that a pre-filing order is necessary to protect both the Court and potential defendants
6 from the burden of litigating Plaintiff's frivolous complaints. *See Martin*, 2015 WL 9489898, at
7 *6. Accordingly, the Clerk of the Court shall not accept for filing any further complaints by
8 Plaintiff until that complaint has first been reviewed by a judge of this court and approved for
9 filing. The pre-filing review will be made by the general duty judge, who will determine
10 whether Plaintiff has stated a potentially cognizable claim in a short, intelligible, and plain
statement.

11 **III. CONCLUSION**

12 For the reasons stated above, the Court DISMISSES Plaintiff's claims for failure to
13 prosecute, and DECLARES Plaintiff a vexatious litigant. The Clerk of the Court shall not file
14 or accept any further complaints filed by Plaintiff. If Plaintiff wishes to file a complaint, he must
15 provide a copy of such complaint, a letter requesting that the complaint be filed, and a copy of
16 this order to the Clerk of the Court. The Clerk shall forward the complaint, letter, and copy of
17 this order to the general duty judge for a determination of whether the complaint should be
18 accepted for filing. Any violation of this order will expose Plaintiff to a contempt hearing and
19 appropriate sanctions, and any action filed in violation of this order will be subject to dismissal.

20 **IT IS SO ORDERED.**

21 Dated: June 28, 2017

22 
23 KANDIS A. WESTMORE
24 United States Magistrate Judge